SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-

ISADORE SHADLETSKY, a/k/a BUDDY SHAD

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CONSTITUTIONAL AND STATUTORY PROVISIONS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Isadore Shadletsky, a/k/a Buddy Shad, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, whereby that Court affirmed the conviction of the Defendant after a jury trial.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not as yet reported, a copy of same is included in the Appendix hereto. (App 1-4)..

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 22, 1974, and this Petition for Writ of Certiorari is being filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The question presented by this case is as follows:

I.

DID THE APPELLATE COURT'S AFFIRMANCE OF THE ACTIONS OF THE TRIAL COURT CONSTITUTE ERROR WHERE THE TRIAL COURT ADMITTED IN EVIDENCE PETITIONER'S PLEAS OF GUILTY TO STATE OFFENSES WHERE THE RECORD BEFORE THE TRIAL COURT FAILED TO SHOW THAT THE PLEAS WERE FREELY, VOLUNTARILY AND KNOWINGLY MADE.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT V—SELF-INCRIMINATION; DUE PROCESS

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . ."

CONSTITUTION OF THE UNITED STATES, AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, ..."

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV:

> Section 1: Privileges and immunities.
> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

STATEMENT OF THE CASE

Petitioner, Isadore Shadletsky, was tried by a jury after indictment and was adjudged guilty on each Count of the Two-Count Indictment charging him with violating Section 5691(a), Title 26, U.S.C. Petitioner was sentenced on Count I to a one-year term in jail, which sentence was suspended except to the extent of 30 days, which Petitioner was directed to serve; and on Count II Petitioner was sentenced to a term of two years' probation, and, in addition thereto, to a $1,000.00 fine.

In substance, Petitioner was charged with carrying on the business of operating as a retail dealer in liquors and willfully, knowingly and unlawfully failing to pay the special tax required by law, to wit: Section 5121, Title 26 of the United States Code, for the period from May 8, 1971 through June 30, 1971, and for the period from July 1, 1971 through December 6, 1971.

The case proceeded to a jury trial, at which time the Government presented its witnesses and documentary evidence. As a part of the presentation of the Government's case herein, witnesses testified that the Defendant operated a private after-hours bottle club (App 6) at certain facilities in Hillsborough County, Florida, and that during the pertinent period set out in

the Indictment that Petitioner had not purchased a Federal Tax Stamp. (App 7-9). Early in the proceedings it came to the attention of counsel for Petitioner that the Government intended to offer in evidence in this case certified copies of pleas of guilty entered by Mr. Shadletsky in state court proceedings in order to establish that the acts done or performed by him as set out in the Indictment were done "knowingly and willfully." An objection was raised when this matter first came to the attention of counsel on the basis that there was no showing in the documents or through any extraneous evidence that the Government intended to offer that the pleas of guilty in the state court proceedings were entered freely, voluntarily and knowingly after appropriate advice by the Court of the implication of said pleas. (App 10-14).

After the presentation of a number of "bottle club members" and state agents, the Government advised the Court that it intended to offer in evidence prior convictions of the Defendant so that the matter could be aired out of the presence of the jury. (App 15, 16). Petitioner's attorney objected to the admissibility of said prior convictions on several specific grounds, namely:

> (1) The fact that the state conviction for selling alcoholic beverages without a license was simply a misdemeanor having no element of knowing, intentional or willful misconduct and, accordingly, there was no nexus or relationship between that conviction and the offense charged herein since the Federal offense is a "specific intent" crime.

(2) That aside from the lack of relationship between the obligation to have a state license and a Federal Tax Stamp, the state offense does not require "mens rea" and the Federal offense is a "specific intent" crime.

(3) On the face of the documents there was no showing that the pleas of guilty were tendered voluntarily, knowingly, and intentionally without coercion or other inducement for the entry of the plea, since the record sought to be admitted in evidence contained no evidentiary finding or determination in that regard nor did the prosecutor seek to supplement the record in that regard. (App 15-24).

Irrespective of the aforesaid objections, the Court admitted in evidence before the jury the prior pleas of guilty of Petitioner as Government's Exhibit 5 (App 5), and at that time the Court instructed the jury that this Exhibit may be considered by them in determining the "element in this case of willfulness or intent, and should not be considered in any way as evidence of defendant's guilt of a crime with which he is charged, but only as an item of evidence, as I say, for your consideration and such weight as you may decide to give it in considering the element of willfulness or intent in this case, . . ." (App 25).

After all the parties rested, the case was submitted to the jury and a guilty verdict rendered as to each Count. Petitioner was adjudicated guilty and sentenced, and from said adjudication and sentence a timely appeal was filed.

REASON FOR GRANTING THE WRIT

The qualifications for review on certiorari, as specified in Rule 19 of this Court, are abundantly and compellingy fulfilled by the case at bar.

I.

The holding of the trial court and of the Court of Appeals that admission in evidence of Petitioner's pleas of guilty to state offenses where the record failed to show that the pleas were freely, voluntarily and knowingly made is not only in conflict with decisions of the Fifth Circuit Court of Appeals, but is alco in conflict with the decisions of other Courts of Appeals and of decisions of this Court. The decision of the Court of Appeals is an invitation to this Court to relieve any doubt that may exist in regard to the admissibility of a "silent record plea of guilty" in subsequent criminal proceedings and thereby decide an important question of Federal law which should be decided by this Court.

In order to prove that the acts done by Petitioner were done with "specific criminal intent" the Government offered in evidence, over objection, Exhibit 5 (App 5), which constituted pleas of guilty by the Defendant to state offenses relating to the sale of liquor without a license and included the penalties imposed on Petitioner by the state judges in connection with proceedings in 1968 dealing with the question of Petitioner's failure to have a liquor license incident to his sale of alcoholic beverages. (App 10-24). Objection was made to the introduction of the certified copy of the transcript of the plea of guilty and adjudication of guilt on the basis that the record did not affirmatively show a waiver of the constitutional right to trial by jury, that the pleas were knowingly, voluntarily and intentionally

made without threats, promises, inducements or coercion on the part of any governmental agent or agency, and that it was the Governmen's burden to show that waiver either in the document itself or through the presentation of testimony; and upon failing to do so, the introduction of the plea and conviction was prejudicial to Petitioner. (App 15-24). Without the admission in evidence of Government's Exhibit 5, the Government wholly failed to prove, either circumstantially or directly, that the acts of the Petitioner were done willfully and knowingly and with a specific intent; and at the close of all of the evidence in the case the Petitioner should have received a judgment of acquittal based upon the motion made in his behalf.

In an analogous situation this Court in *Burgett v. Texas,* 389 U.S. 109, 19 L.Ed. 2d 319, 88 S.Ct. 258 (1967), held that although the Court does not sit as a Court of criminal appeals to review State Court cases, when rules of evidence infringe upon federal constitutional guarantees then the Supreme Court will intervene. The Court cited examples of instances in which it would intervene and then in regard to the facts of the case and the law to be applied it made the following statement: (P 324, 325).

> "The same result must follow here. *Gideon v. Wainright* established the rule that the right to counsel guaranteed by the Sixth Amendment was applicable to the States by virtue of the Fourteenth, making it unconstituional to try a person for a felony in a state court unless he had a lawyer or had validly waived one. And that ruling was not limited to prospective applications. See *Dougherty v. Maxwell,* 376 U.S. 202, 11 L.Ed. 2d 650, 84 S.Ct. 703; *Pickelsimer v. Wainright,* 375 U.S. 2, 11 L.Ed. 2d 41, 84 S.Ct. 80. In this case the certified records of the Tennessee conviction on their face raise a presump-

tion that petitioner was denied his right to counsel in the Tennessee proceeding, and therefore that his conviction was void. Presuming waiver of counsel from [389 U.S. 115] a silent record is impermissible. *Carnley v. Cochran,* 369 U.S. 506, 8 L.Ed. 2d 70, 82 S.Ct. 884. To permit a conviction obtained in violation of *Gideon v. Wainright* to be used against a person either to support guilt or enhance punishment for another offense (see *Greer v. Beto,* 384 U.S. 269, 16 L.Ed. 2d 526, 86 S.Ct. 1447) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right. "The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon v. Wainright is* inherently prejudicial and we are unable to say that the instructions to disregard it made the constitutional error 'harmless beyond a reasonable doubt' within the meaning of *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824."

In the *Burget* opinion there was no question about the authenticity of the certified copy of the prior Texas proceedings, and Petitioner's counsel objected to the introduction of the record on the grounds that the judgment on its face showed no counsel was present at the time of the plea of guilty and, accordingly, the plea and judgment was void on its face, not voidable. The reversal by this Court unequivocally establishes that the plea and conviction were void and, therefore, inadmissible, the burden being upon the State to establish the propriety of the proceedings; and upon their failure to do so, the evidence cannot be presented before a jury.

Specifically dealing with the question of the voluntariness of a plea of guilty, it has been held that a guilty

plea in either State or Federal Court must be knowingly and voluntarily made and that the voluntariness of a plea of guilty is a matter of Federal Constitutional Law to which Federal standards are applicable, although imposing a higher standard than State Courts normally might under the circumstances. *U.S. ex rel. Scott v. Mancusi,* 429 F.2d 104 (2d Cir. 1970); *U.S. ex rel. Young v. Maroney,* 309 F.Supp. 109 E.D. Pa. 1969).

A plea of guilty constitutes a waiver of several constitutional rights, and it has been held that it is imperative that the plea be voluntarily and knowingly made; otherwise, it is constitutionally imperfect and void. *U.S. ex rel. Burke v. Erickson,* 315 F.Supp. 576 *aff'd* 438 F.2d 326 (D.C.S.D. 1970).

Interestingly, the Fifth Circuit Court of Appeals has on several occasions recently dealt with the problems that were presented to the trial court and on each occasion has disposed of the question in a manner that requires reversal of these proceedings. In *Oakes v. Wainright,* 445 F.2d 1062 (5th Cir. 1971), the Court made the following disposition of a substantially similar issue:

> "Certainly there is no novelty in the assertion that a criminal conviction grounded upon an involuntary plea of guilty is violative of due process of law in both State and Federal prosecutions. *Wade v. Wainright,* 420 F.2d 898, 900 (5th Cir. 1969); *Busby v. Holman,* 356 F.2d 75, 78 (5th Cir. 1966). But *Boykin* imparts a unique twist to this rule by requiring affirmative evidence in the record to establish an intelligent and voluntary plea, thereby rejecting as insufficient the mere lack of evidence that the plea was involuntary or coerced. 'It was error, plain on the face of the record, for the trial judge to accept Petitioner's guilty plea without an

> affirmative showing that it was intelligent and voluntary.' 395 U.S. at 242, 89 S.Ct. at 1711, 23 L. Ed. 2d 279."

The same Court reversed the trial court which granted a writ of habeas corpus in that it found from the record that the plea of guilty was knowingly and voluntarily made.

In the case of *Fortia v. United States,* 456 F.2d 194 (5th Cir. 1972), it was held that a plea of guilty is *invalid* where the record does not show that the Defendant was informed of the maximum possible sentence that could be imposed; and, accordingly, an order was entered directing that unless a showing was made that the Defendant had learned of the maximum possible sentence from some source prior to the time of entry of the plea, his conviction should be set aside. The Fifth Circuit in the case of *United States ex rel. Hill v. United States,* 452 F.2d 664 (5th Cir. 1971), came to the same conclusion as just set out.

Where the record does not affirmatively show that the Defendant understood the nature of the charge and the consequences of his plea, and that a plea of guilty was knowingly and voluntarily made, said plea is void and invalid and of no force and effect as opposed to being voidable and valid until set aside. *United States v. Bronson,* 449 F.2d 302 (10th Cir. 1971); *Young v. United States,* 433 F.2d 626 (10th Cir.); *Jenkins v. United States,* 420 F.2d 433 (10th Cir.).

The plea of guilty admitted by the Court was to a misdemeanor that did not require proof of "specific intent" although the crime herein charged requires proof of "specific intent." Irrespective of all of the other infirmities that appear in the admission of the plea of

guilty, the plea of guilty had no probative value relating to the issue of willfulness; but the presentation of the Petitioner to the jurors as a criminal had a substantial prejudicial effect upon him.

The record presented to the trial court was totally devoid of any showing that the plea of guilty was knowingly, voluntarily and intentionally entered by Petitioner in the State Court in 1968 with a knowledge of the consequences of said plea, which renders said pleas and the ultimate convictions void and invalid. *Reed v. United States,* 471 F.2d 721 (5th Cir. 1973); *Cooks v. United States,* 461 F.2d 530 (5th Cir. 1972); *United States v. Frontero,* 452 F.2d 406 (5th Cir. 1971); *McCarthy v. United States,* 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed .2d 418 (1969).

The most recent reported expression by any court dealing with the issue herein set forth is found in *Mills v. Municipal Court for the San Diego Judicial District of San Diego,* 515 P.2d 273 (S.Ct. Calif. 1973) wherein that court applied the *Boykin, infra,* doctrine and held that a silent record involving a plea of guilty, even to a misdemeanor, is void.

The actions of the trial court and of the appellate court affirming the admissibility of a "silent record" plea of guilty in a subsequent criminal proceeding cannot be permitted to stand when reviewed in the context of this Court's opinion in *Boykin v. Alabama,* 395 U.S. 238, 89 S.C. 1709 (1969) where on page 1712 the following language appears:

> ". . . Admissibility of a confession must be based on a 'reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant.' Jackson v. Denno, 378 U.S. 368, 387,

84 S.Ct. 1774, 1786, 12 L.Ed.2d 908. The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In Carnley v. Cochran, 369 U.S. 506, 516, 82 S.Ct. 884, 890, 8 L.Ed.2d 70, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.'

"We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. Douglas v. Alabama, 380 U.S. 415, 422, 85 S.Ct. 1074, 1078, 13 L.Ed.2d 934.

"Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653. Second is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491. Third, is the right to confront one's accusers. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923. We cannot presume a waiver of these three important federal rights from a silent record."

CONCLUSION

The decision below departs radically from both substantive and procedural judicial precedent. The matter involved is of extreme general and national significance. The holdings below cannot be reconciled with those of this Court, other Courts of Appeals and District Courts.

The maintenance of uniformity in the administration of criminal justice in the Federal Courts is jeopardized by the decision below. For all of the reasons listed above, it is most strenuously urged that this Court exercise its discretion and grant the writ.

/s/ Arnold D. Levine
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725 East Kennedy Boulevard
Tampa, Florida 33602
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Rule 33 of the Rules of this Court, on the 19th day of April, 1974, three copies of the Petition for Writ of Certiorari and Appendix were mailed, postage paid, to the Solicitor General, United States Department of Justice, Washington, D. C. 20530, and three additional copies were mailed to United States Attorney, Post Office Building, Tampa, Florida. I further certify that all parties have been served.

/s/ Arnold D. Levine
ARNOLD D. LEVINE
725 East Kennedy Boulevard
Tampa, Florida 33602
Attorney for Petitioner

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-

ISADORE SHADLETSKY, a/k/a BUDDY SHAD

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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A-2

UNITED STATES of America, Plaintiff-Appellee,

v.

Isadore SHADLETSKY, also known as Buddy Shad, Defendant-Appellant.

No. 73-2197

Summary Calendar*

United States Court of Appeals,

Fifth Circuit

March 22, 1974

Defendant was convicted before the United States District Court for the Middle District of Florida at Tampa, Wm. Terrell Hodges, J., of two counts of operating as a retail dealer in liquors and wilfully, knowingly and unlawfully failing to pay the special tax required by law. The defendant appealed. The Court of Appeals, Godbold, Circuit Judge, held that evidence of a state court conviction of selling liquor without a license was properly admitted as probative of knowledge or intent and that it was not necessary as a prerequisite to the admissibility of the record of the state court conviction to supplement that record by extrinsic evidence establishing that the defendant's guilty plea met all constitutional standards of voluntariness.

Affirmed.

1. Criminal Law §371(1)

Admission into evidence of prior offense as tending to show intent to commit the offense presently charged requires similarity but not precise identity of offenses; the similar offense must include the essential physical elements of the offense charged, and those physical elements, but not the mental ingredients, must be clearly shown by evidence that is plain, clear and conclusive.

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* Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir., 1970, 431 F.2d 409.

2 Criminal Law §371(10)

Evidence that defendant had been convicted on state charge of selling liquor without a license was properly admitted in evidence in prosecuion for wilfully, knowingly and unlawfully failing to pay the special tax required of a retail dealer in liquors as tending to show intent to commit the offense presently charged. 26 U.S. C.A. (I.R.C. 1954) §§ 5121, 5691(a).

3. Criminal Law §374

It was not necessary as prerequisits to admissibility of record of state court conviction, which was valid and regular on its face, to supplement that record by extrinsic evidence establishing that the guilty plea to the state charge met all constitutional standards of voluntariness.

Appeal from the United States District Court for the Middle District of Florida.

Before GEWIN, GODBOLD and CLARK, Circuit Judges.

GODBOLD, Circuit Judge:

Appellant was convicted on two counts charging that he operated as a retail dealer in liquors and wilfully, knowingly and unlawfully failed to pay the special tax required by law,[1] in violation of 26 U.S.C. § 5691(a).

The government offered in evidence over objection and as probative of knowledge or intent the record of an earlier state court conviction of selling liquor without a license, a misdemeanor which did not require proof of specific intent. The court admitted the evidence with an instruction limiting it as proffered, and gave another limiting instruction as part of the charge to the jury.

The offense is one requiring proof of specific intent.

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[1] 26 U.S.C. § 5121 requires every retail dealer in liquors to pay a tax of $54 a year.

[1, 2] Admission into evidence of a prior offense as tending to show intent to commit the offense presently charged requires similarity but not precise identity of offenses. The similar offense must include the essential physical elements of the offense charged, and those physical elements, but not the mental ingredients, must be clearly shown by evidence that is "plain, clear and conclusive." United States v. Broadway, 477 F.2d 991 (CA5, 1973). The necessary congruence of essential physical elements is present in the two offenses with which we are here concerned. Examining the contours of the two offenses, we see that the physical elements of the offense charged are, in the language of the indictment, dual in nature —"carry[ing] on the business of a retail dealer in liquors" and "fail[ing] to pay the special tax." The physical elements of the prior state offense were similarly dual—unlawful sale of an alcoholic beverage while not holding a license permitting such sale. The state offense could be committed by making a single and casual sale of liquor, but this possibility does not cause it to lack sufficient nexus to the carrying on of a retail business in liquor, which embraces the concept of repetitive sales of the same type of commodity. The second prong of the physical elements of the offense charged and prior offense is substantially if not wholly concurrent—in both cases failure to comply with a government-imposed condition precedent to carrying on a business activity, in the earlier case purchase of a license and in the present case payment of a special tax.

Having concluded that there is sufficient identity in the contours of the physical elements of the two offenses, we turn to the matter of sufficiency of proof. This circuit committed itself in *Broadway* to the rule that the actual existence, in the prior offense, of the congruent physical elements must be plain, clear and conclusive and that proof of vague and uncertain character is not permissible. Id. at 995. Proof of the mental ingredients of the prior offense need not be shown, because the significance of the prior conduct is that it tends to prove a pattern of criminal conduct pointing directly toward the act charged, from which the trier

of face can infer circumstantially the intent and knowledge with which the act charged was committed. Id. at 994. In *Broadway* the proof of the prior offense did not meet the standard of clarity and conclusiveness.[2] In the instant case there is no question of sufficiency of the proof that the physical elements were present in the prior offense. The proof consisted of a prior conviction on a plea of guilty by which defendant judicially admitted all elements of the offense.

[3] It was not necessary as a prerequisite to admissibility of the record of the state court conviction, which was valid and regular upon its face, to supplement that record by extrinsic evidence establishing that the guilty plea met all constitutional standards of voluntariness. Pretermitting whether involuntariness of the plea, if proved, would require reversal where the prior conviction was used as here, appellant's argument on this point seeks to transmute the right of a defendant to collaterally attack a guilty plea into an affirmative obligation on the prosecution to establish as a prerequisite to admissability elements relating to voluntariness that might on a proper collateral attack be the subject of inquiry.

Affirmed.

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[2] In note 4, the court in *Broadway* distinguished United States v. Harrison, 461 F.2d 1127 (CA5, 1972), which, like *Broadway* was an interstate transportation of forged securities case. The court pointed out that in *Harrison* the proof of the physical elements of the prior offense—introduction of forged securities into the stream of commerce by actually passing them—had been sufficient.

A-6

#68853

The State of Florida

vs.

ISADORE SHADLETSKY a/k/a BUDDY SHAD

Information for

SELLING ALCOHOLIC BEVERAGES
WITHOUT A LICENSE

Come now Assistant County Solicitor, Michael Hayes, and the defendant, Isadore Shadletsky a/k/a Buddy Shad, with his counsel, W. Crosby Few, and withdrew plea of not guilty heretofore entered, and upon being arraigned in open court, entered a plea of guilty as charged in the information,

It is CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant, Isadore Shadletsky a/k/a Buddy Shad, is guilty as charged in the information.

Now on this day came in person the defendant, Isadore Shadletsky a/k/a Buddy Shad, and being asked by the Court whether he had anything to say why the sentence of the law should not now be pronounced upon him, says nothing,

It is therefore, the JUDGMENT, ORDER AND SENTENCE of the Court, that you, Isadore Shadletsky a/k/a Buddy Shad, for the crime of which you have been and stand convicted, pay a fine of $250.00 or be confined in the county jail at hard labor for a period of NINETY (90) DAYS.
May 28, 1969

Q Did you ever go inside the building?

A No, sir.

Q What purpose were you there for?

A My capacity was to take care of the exterior, anything that went wrong with the exterior part of the building or the well and pump. And I did have to have

a new roof put on one of the buildings, and I have forgotten what year it was — because it was leaking. And I had to go out there to see about a couple of pumps that had to be replaced.

Q To your knowledge, do you know what Mr. Shad — what he wanted the building for?

A Well, at the time that I leased the property to him I asked Mr. Shad, and he told me he wanted it for a private club or an after-hours club or bottle club.

Q But you have never been to the club?

A No.

MR. MENENDEZ: Would you mark Government's Exhibit Number 2 as a Composite Exhibit?

(Government's Composite Exhibit 2 marked for Identification.)

MR. LEVINE: Your Honor, I understand Mr. Menendez has some photographs in his hand. If he will just make a representation of what

MR. BRIGGS: No, sir.

THE COURT: Mark these as Government's Exhibits, separate Exhibits, Mr. Clerk.

(Whereupon, Government's Exhibits 3 and 4, respectively, were marked for Identification; Court's Exhibits 1 and 2, respectively, were marked for Identification; and proceedings were resumed before the Jury as follows:

THE COURT: Does the Government desire to offer Government's Exhibits 3 and 4 for Identification?

MR. MENENDEZ: Yes, Your Honor. We would like permission to publish them to the jury by reading portions of them.

MR. LEVINE: No objection to the admission of the documents.

THE COURT: Those two Exhibits are received in evidence without objection, and may be published to the jury.

(Government's Exhibits 3 and 4, respectively, received in evidence.)

MR. MENENDEZ: I will publish Exhibit Number 3. I am reading to you a certification of lack of record. It is dated February 8, 1972, and it reads, "To All To Whom These Presents Shall Come, Greetings:

"I hereby certify that I have legal custody of Federal tax forms and related documents filed with the Internal Revenue Service office. I further certify that a diligent search has been made of the records in my custody and no tax form as described below was found to have been filed in the name of the person indicated.

"Name of person: Buddy Shad or Isadore Shadletsky.

"Address: 6015 North Dale Mabry Highway, Tampa, Florida.

"Kind of tax form: Form 11, Retail Dealer in Liquors, Tax period ending June 30th, 1971."

This is signed by Robert J. Johnson, Chief of the Records Section, Department of the Treasury, Internal Revenue Service.

Exhibit Number 4 reads: "I hereby certify that I have legal custody of Federal tax forms and related documents filed with the Internal Revenue Service office. I further certify that a diligent search has been of the records in my custody and no tax form as described below was found to have been filed in the name of the person indicated.

"Name of person: Buddy Shad or Isadore Shadletsky.

"Address: 6015 North Dale Mabry Highway, Tampa, Florida.

"Kind of tax form: Form 11, Retail Dealer in Liquors, Tax period ending June 30, 1972."

This is also signed by Mr. Johnson, and it is dated February 8, 1972.

THE COURT: Are you ready to call your next witness?

MR. BRIGGS: Yes, Your Honor. The next witness is a rather lengthy wtness.

THE COURT: All right. Well, it happens I have another matter that I am supposed to hear this afternoon, anyway. And if it is to be a lengthy witness, we will recess at this time until in the morning, then.

Well, as you just heard me announce, ladies and gentlemen, we have gotten a good headstart in this case. Counsel says they hope to finish tomorrow. You never can tell. It always

there are no prejudices that could visit upon the Government.

THE COURT: I understand.

MR. LEVINE: It is just a procedural type approach.

THE COURT: Well, let's wait and see if these witnesses are called.

MR. BRIGGS: All right.

THE COURT: If you intend to call the witness, then I will want to confer with you in camera and review these transcripts to see whether there is anything of that nature. Otherwise, they would be Jencks Act statements unless there is some compelling reason, some rule of law, that might make them unavailable, that I am not aware of. But we will deal with that when it arises.

All right. Now, what else?

MR. LEVINE: Mr. Briggs has mentioned the question of the admissibility of a conviction in State court of my client in 1968. I have a copy of the proceedings in

State court based upon the Information — for some reason I only have the reverse side of the Information, I don't have the front side of the Information, so I don't precisely know what the charge is. Maybe if the Court had the benefit of the charge — the proceedings were on a plea of Guilty — and Mr. Briggs advises me that he has got a memo he is in the process of preparing. I do have a case, a recent Fifth Circuit case, that at least deals to some extent with the question of admissibility of convictions and for what purpose it may or may not be admitted.

And then another aspect of my concern — maybe I am premature — but when you look at the disposition, you see a plea of Guilty with counsel present. You find nothing else, meaning no advice as to the effect, the extent of the potential penalty, that it is freely and voluntarily done. There are none of the procedural due process emoluments that are now a necessary and essential ingredient since the Supreme Court decisions in State and Federal court, shown by the record in regard to the entry of the plea. And maybe we had just best wait until we — I mean, Your Honor may have some feeling about it or may have some — may have dealt with the question before, and maybe if you just see the documents, that might be of assistance.

THE COURT: Let me see what the charge was.

MR. BRIGGS: Yes. Here is the Exhibit that I give you now. — For the sake of counsel who has not obtained a copy of this, would you like to go ahead and read that?

MR. LEVINE: No. That's okay. I have the reverse side of the Information. They have the front side there.

MR. BRIGGS: All right. (Handing document to the Court)

THE COURT: (Examining document)

MR. BRIGGS: Judge, without going into full argument at this time, we simply state that the document, itself, shows its regularity on its face, that is, the pres-

ence of counsel, and conforms with all subsequent case law concerning the collateral attack on the legality of the proceedings, and that it has to be accepted as regular on its face. That no counsel can bring in other evidence to show that it was irregular. It is admissible as it stands now.

MR. LEVINE: I trust, Your Honor, we are not dealing with a question of authenticity or the like? We are dealing with a question of regularity.

THE COURT: I understand. I understand. — Well, it would seem to be — and this is the only — there is only this one prior conviction that you intend to offer?

MR. BRIGGS: Yes, sir.

THE COURT: Does defense counsel have or desire to present any evidence with respect to any constitutional defect, if any, in this proceeding?

MR. LEVINE: Your Honor, I would assume so. First, I would like to see what the memorandum says and what position, legal position they take, to see whether or not I am required at all. I understand this isn't their first document, that they can go on and they have evidence, you know. So maybe I can address myself when I get to look at the memo to that.

THE COURT: All right.

MR. LEVINE: I would note to the Court the case of U.S. vs. Garber, 471 Fed. 2d 212. It is a December, 1972, Fifth Circuit opinion. It deals with a similar problem.

In that case the defendant took the witness stand and was impeached by prior convictions, one going to prove knowledge under the general rule of impeachment, and the Fifth Circuit deemed that the admission of that coupled with the oral argument was plain error, and has completely receded, as I read the opinion, from the rule of admissibility of prior conviction, or substantially that. It is an interesting new opinion in that area, not touching on the question of the constitutional propriety of the proceedings at all. It goes to the issue of admissibility because of the prejudice it may visit upon the defendant.

Judge, there is one other thing that has come to my mind, and I just noted it when I came into the Courtroom and started to re-review my client's Grand Jury testimony. We have this issue — and I think that I would like to present some testimony on this in the absence of the Jury.

What happened in this matter — for some reason I got confused on the dates, and I didn't appreciate the significance of this before. My client appeared before a Federal Grand Jury on November 20, 1970. The reason why I say I got confused on the dates is that questions concerning some of the bottles?

THE COURT: Well, of course, the witness is still here, and —

MR. BRIGGS: All right, sir.

THE COURT: — And to the best of my knowledge, the evidence hasn't yet been offered.

MR. BRIGGS: Counsel has indicated that he will not object.

THE COURT: — Except as to those three bottles with respect to which the motion and objection have been made and overruled.

MR. LEVINE: Yes.

MR. BRIGGS: Yes, sir.

THE COURT: All right. Now, what is the Exhibit number given to all this, Mr. Clerk?

MR. BRIGGS: Number 8, isn't it?

THE CLERK: That is 7.

MR. BRIGGS: Wasn't 7 the —

THE COURT: While we straighten that out, Mr. Marshal, let's have the Jury back in the Box.

THE CLERK: It is 7, Your Honor. This will be Composite Government 7.

THE COURT: All right.

MR. BRIGGS: Now, Your Honor, in the absence of the Jury, the next Exhibit to be offered is the prior conviction, and I want to alert counsel to that.

MR. LEVINE: Well, maybe we ought to hold the Jury out for a couple of minutes.

THE COURT: Mr. Clerk, tell the Marshal to take the Jury back for a second.

— Mr. Marshal, apologize to the Jurors for me and ask them to return to the Jury Room. There is another matter I want to discuss with counsel.

MR. LEVINE: Your Honor, in regard to the admissibility of the prior conviction, I have read the memo, and I don't know if Your Honor has had an opportunity to read it. It has no bearing on the question, the question that I raise in regard to admissibility.

Number one, it is my understanding that the charge that we are dealing with here is a State offense for selling alcoholic beverages without a license. That's a misdemeanor, and there is no nexus or relationship between the obligation to have a State license and this Federal stamp. The gist is, there is just no relationship between the two. One has no bearing upon the other. One is not a condition precedent to the other. He could have his Federal stamp and still be in violation of the State law. He can have his State license and still be in violation of the Federal law. There just is no connection between the two.

Secondarily, we deal with the question that we are dealing here with a misdemeanor and we have the Federal felony offense with an attempt to prove an aspect of the Federal felony offense. There is no mens rea required or specific intent required with regard to the violation of this State staute, whereas willfulness and knowledge are a necessary and required ingredient of the Federal statute, and the plea here would in no way be probative of any issue that the Jury has to consider here.

Thirdly, the specific point that I raise to Your Honor deals with the question of the total lack of rec-

ord dealing with the question of voluntariness, knowing, willful, and lack of inducement or coercion to enter a plea. The only record that we have is that one counsel was present and that a plea was tendered. There is no evidentiary finding or determination that it was freely and voluntarily made without any threats, promises, inducements, et cetera.

THE COURT: Well, right there with respect to that ground, Mr. Levine, it seems to me that if the Judgment of Conviction properly authenticated is otherwise admissible in this case, putting aside your first two grounds for a moment, then it is presumptively valid. Do you have any evidence that you wish to offer that would in effect, if you will, collaterally attack the validity of the adjudication of guilt for that offense on constitutional or other grounds?

MR. LEVINE: I feel that I would like to offer evidence on that. But I would like to deal with Your Honor's statement that it is presumptively correct —

THE COURT: Presumptively valid.

MR. LEVINE: Presumptively valid — I'm sorry. And I believe the cases support me in the attorney area, and I know of no distinction being made, meaning lack of counsel, in regard to voluntariness of the plea. When a record is totally silent in regard to either the presence or absence of counsel, or the fact the — I don't have it before me at the moment — was it Garfield or something?

MR. LEVINE: Garber.

THE COURT: — The Garber case, Judge Roney's opinion that you cited earlier. And I have read the memorandum of the Government.

It seems to me that Judge Roney's opinion is not apposite to these circumstances that had to do, in my judgment, at least, as I read the case, with the use of prior felony convictions for the identical offense as impeachment of the defendant who testified in that case, coupled with — and this is where the plain error was found, as I read the opinion — argument by the prose-

cutor to the jury that these convictions could be considered by the jury as showing propensity for the commission of the offense being tried, which, of course, was never admissible. But there is established law in the Fifth Circuit and elsewhere which, as a narrow exception to the rule, does permit evidence of prior offenses, or, for that matter, subsequent offenses, of the defendant to be received where they are not too remote in point of time and where they are substantially similar to the offense being tried, that they come in not to show propensity for the commission of the offense nor to show the bad character of the defendant, but, rather, to show evidence which the jury may consider with regard to the element of knowledge or intent or whatever other element there might be in the particular crime being tried, to which a prior conviction for a similar offense might be probative.

In this case it seems to me that the nature of the offense is similar, and I don't have it before me, but the conviction, as I recall, was in 1968. Let me see —

MR. LEVINE: Yes, sir, it is 1968.

THE COURT: — And we are dealing in this Indictment with periods in 1971. The offense I notice that was charged in this State case is predicated on an Information that was filed October 22, 1968, alleging an offense that occurred on June 14, 1968, to which the Defendant entered a plea of Guilty and was adjudged guilty by the Court on May 28, 1969.

According to these documents, pursuant to the Rule or, at least, as I understand the law as I just announced it, it does seem to me, one, that this offense is not too remote in point of time, or, stated affirmatively, is proximately related in point of time to the date of the offenses alleged in the Indictment, and is of a substantially similar nature as to be admissible in this case under the exception to the Rule which would permit it to come in subject to a limiting instruction to the Jury, that they may give it such consideration or weight as they may think it is entitled to, not as evidence of the Defendant's guilt of the offense in this case, but,

rather, for such consideration as they may wish to give it in terms of the element of knowledge or intent in this case.

MR. LEVINE: Your Honor, if Your Honor uses the term "knowledge" — of course, the knowledge of the requirement to have a State license does not either infer or imply any knowledge of the requirement to have a Federal license.

THE COURT: I understand.

MR. LEVINE: And I would, of course, object to Your Honor instructing the Jury on a limiting basis, you know, by inclusion of that word.

THE COURT: All right. That point may be well taken, and was a poor choice of words on my part. It goes — if to anything, it goes to the element of willfulness or intent.

MR. LEVINE: Well, I think that I have made the record to that extent —

THE COURT: To this point.

MR. LEVINE: — And would Your Honor, when admitting this document over objection, give the Jury the limiting instruction at this time?

THE COURT: I will.

Now, let's have the Jury, please.

(Whereupon, the Jury, including the Alternate Juror, was recalled and seated, and proceedings were resumed in the presence of the Jury, the Defendant and his counsel, as follows:)

THE COURT: Thank you, ladies and gentlemen.

MR. BRIGGS: May it please the Court, at this time the Government would offer into evidence the items seized by virtue of the service of the search warrant on December the 4th.

THE COURT: Which have been collectively marked, Mr. Clerk, as what — Government's Exhibit 6?

THE CLERK: 7, Your Honor.

THE COURT: 7. — All right. At this point —

MR. LEVINE: No objection except as stated out of the presence of the Jury.

THE COURT: All right. The record will so reflect, and my ruling will be the same. And I receive Government's Exhibit 7, a Composite Exhibit, into evidence.

(Government's Composite Exhibit 7 received in evidence.)

DIRECT EXAMINATION (Resumed)

BY MR. BRIGGS:

Q Mr. Whitehurst, would you step down here for a moment, please, sir. I direct your attention to the scotch whiskey there. How many bottles have the name "tancy" on them? — Speak loud, because the Court Reporter is going to have to hear you.

A Two.

Q Are any of them yet unbroken or unopened?

A Yes, sir. One bottle of Drury's Scotch.

MR. LEVINE: I have nothing.

THE COURT: Thank you, Mr. Whitehurst. You are excused.

(Witness retires from Courtroom.)

MR. BRIGGS: May it please the Court, at this time we would offer into evidence Government's Exhibit 5 for Identification.

MR. LEVINE: I have no further objection. I have previously stated an objection for the record, and we adopt it at this time.

THE COURT: All right. The record will so reflect, and my ruling will be the same. And I do receive at this time Government's Exhibit Number 5.

(Government's Exhibit 5 received in evidence.)

THE COURT: I would caution you, ladies and gentlemen of the Jury, however, with respect to Government's Exhibit Number 5, that it is being received in evidence by the Court for such consideration as you may decide to give it, such weight as you may decide that it is entitled to, if any, only with respect to the element in this case of willfulness or intent, and should not be considered in any way as

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1660

ISADORE SHADLETSKY, a/k/a BUDDY SHAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court improperly admitted in evidence the record of petitioner's prior conviction on a guilty plea, where the judgment did not recite that the plea was voluntary or that petitioner had been advised of the maximum penalty for the offense.

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of having conducted a retail liquor business without having paid the required federal tax, in violation of 26 U.S.C. 5691(a). He was sentenced to a term of one year's imprisonment (suspended except for 30 days) and two years' probation, and fined $1000. The court of appeals affirmed (Pet. App. A-2).

The testimony at trial showed that petitioner operated an after-hours "bottle club" in Florida, at which he dispensed alcoholic beverages without having purchased

the federal tax stamp required by 26 U.S.C. 5121. During the trial, the Assistant United States Attorney advised the court and opposing counsel of his intention to introduce into evidence a record of a prior state court conviction for the unlicensed sale of alcoholic beverages, "in order to show that this offense was committed knowingly and with a specific intent" (Tr. 42).

The state court judgment was entered upon petitioner's plea of guilty and recited that petitioner had appeared with counsel. Petitioner's counsel at trial nevertheless objected to the introduction of the evidence on the ground that the judgment failed to show upon its face whether petitioner had been advised of the maximum penalty for the offense prior to pleading guilty, and failed to show that the plea was voluntary (Tr. 46). After further discussion (Tr. 266-268), the court expressed the view that an authenticated judgment is presumptively valid and asked petitioner's counsel if he wished to present a collateral attack on the state conviction. Counsel contended that he had no burden to do so upon a silent record (Tr. 268-269). After the court ruled it admissible, the judgment of petitioner's prior conviction was read to the jury (Tr. 272, 277-279).

Relying principally upon *Burgett* v. *Texas*, 389 U.S. 109, petitioner contends that whenever the record of a prior conviction is silent with respect to the voluntariness of a guilty plea, the conviction is presumptively void, and the prosecution must affirmatively demonstrate the regularity of the prior proceedings before being permitted to place the judgment in evidence.

Burgett, however, lends no support to petitioner's assertion. There, the record of the prior conviction on its face raised "a presumption that petitioner was denied his right to counsel * * * and therefore that his conviction

was void." *Burgett* v. *Texas, supra*, 389 U.S. at 114. Here, there is no doubt that petitioner had the advice of counsel, since the unrebuted record of his state conviction so indicates. In these circumstances, the prior judgment satisfies the *Burgett* test. See *Bates* v. *Nelson*, 333 F. Supp. 896, 901 (N.D. Cal.). The fact that counsel was present, coupled with the presumption of regularity in court proceedings, serves to rebut any adverse inference to be drawn from a silent record. Cf. *Wilson* v. *Wiman*, 386 F. 2d 968, 969 (C.A. 6), certiorari denied, 390 U.S. 1042.

Moreover, we note that petitioner does not allege the *actual* invalidity of his state conviction, but relies wholly upon what he perceives to be the government's burden of proof. Petitioner has not contended that he was unaware of the maximum penalty for his offense, or that he was induced by improper means to enter his plea of guilty. When a defendant fails to offer facts that cast doubt upon the validity of a prior judgment, the presumption of regularity is not overcome. See *Forthoffer* v. *Swope*, 103 F. 2d 707, 710-711 (C.A. 9). Petitioner's claim that the government must support the validity of his prior conviction is frivolous in view of his failure to mount a collateral attack on that judgment or even to allege its irregularity.

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.